Supreme Court, U.S.
FILED

001896 JUN 20 2001

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In The

Supreme Court of the United States

LEON WATTS,

Petitioner,

v.

ERNEST C. ROE, Warden; and The ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

MAY THE COURT OF APPEALS SUMMARILY DENY PETITIONER'S APPLICATION FOR A CERTIFICATE APPEALABILITY WHEN THE PETITIONER HAS DEMONSTRATED THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING?

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PETITION FOR WRIT OF CERTIORARI

The petitioner Leon Watts respectfully prays that a writ of certiorari issued to review the order issued by United States Court of Appeals for the Ninth Circuit denying his request for a certificate of appealability.

OPINION BELOW

On March 30, 2001, the Court of Appeals filed an unpublished order in *Leon Watts v. Ernest C. Roe,* CA 01-55083 denying petitioner's request for a certificate of appealability. A copy of that order is attached hereto as Appendix "1".

JURISDICTION

On March 30, 2001, the Court of Appeals entered an order denying appellant's application for a certificate of appealability. (App. "1".) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). "This Court has jurisdiction under § 1254 to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals." *Hohn v. United States,* 524 U.S. 236, 253, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

Jurisdiction existed in the district court pursuant to 18 U.S.C. § 2254.

STATUTES INVOLVED IN THIS CASE

Title 28 § 2244(d)(1) provides:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Title 28 § 2253, as amended in 1996, which provides:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the

final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

"(B) the final order in a proceeding under section 2255.

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

"(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

Title 28 § 2254(a) provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ

of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Fed. R. 15(c)(2) provides:

An amendment of a pleading relates back to the date of the original pleading when

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Ninth Circuit Rule 22-1 (c) provides:

Denial in Full by District Court; Motion by Petitioner. If the district court denies a certificate of appealability as to all issues, petitioner may, within thirty-five days of the district court's entry of its order denying a certificate of appealability, file in the court of appeals a motion for a certificate of appealability along with a statement of reasons why a certificate should issue as to any issue(s). If no motion for a certificate of appealability is filed, the court of appeals will deem the notice of appeal to constitute a request for a certificate of appealability. In either case, the respondent may file a response within thirty-five days of the notice of appeal or motion, whichever is later. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon

as practicable after the district court's entry of its order denying a certificate of appealability.

STATEMENT OF THE CASE

On December 16, 1985, a jury found Leon Watts guilty of murder. On January 6, 1986, Watts was sentenced to state prison for life without possibility of parole. The California Court of Appeal affirmed his conviction on November 21, 1989.

Watts then filed a Petition for Review in the California Supreme Court. The Petition was denied on March 15, 1990. Watts then filed a Petition for Writ of Habeas Corpus in the Los Angeles Superior Court. That Petition was denied on December 22, 1994.

On April 11, 1997, Watts filed his first habeas corpus petition in the United States District Court, Central District of California. On September 9, 1997, the district court denied the petition "without prejudice to petitioner's *right to refile* after exhaustion of state remedies. This order was entered into the clerk's docket on September 12, 1997.

Watts also filed a habeas application in the California Supreme Court on April 11, 1997, and that petition was denied on June 17, 1998.

On March 22, 1999, Watts filed a Petition for Writ of Habeas Corpus, which was the basis for petitioner's application for certificate of appealability. The district court construed the Petition to have been filed on March 13, 1999, based on the "mailbox rule", which provides that a federal habeas application is deemed filed at the

moment the petitioner delivers it to prison authorities for forwarding to the clerk of court. *Saffold v. Newland*, 224 F.3d 1087, 1091 (9th Cir. 2000). The Petition bears a Proof of Service dated March 13, 1999. Accordingly, the district court construed the Petition to have been filed as of March 13, 1999.

On July 1, 1999, respondent filed a Motion to Dismiss the Petition on the ground that it was untimely pursuant to the statute of limitations set forth at 28 U.S.C. § 2244(d). On November 8, 2000, the district court granted respondent's motion to dismiss, did not decide the case on the merits, and entered a judgment and order denying Watts' Petition for Writ of Habeas Corpus. The case was dismissed with prejudice.

Watts filed a timely Notice of Appeal on November 11, 2000. The district court issued an order denying request for certificate of appealability.

Petitioner made an application in the Ninth Circuit pursuant to Circuit Rule 22-1(c) for a Certificate of Appealability. Watts appealed an Order and Judgment denying his Petition for a Writ of Habeas Corpus by a person in state custody. 28 U.S.C. § 2254. The district court did not decide Watts' Petition on the merits. It made a procedural ruling and found the Petition was time-barred pursuant to the statute of limitations proscribed in 28 U.S.C. § 2244(d)(1)(a).

The basis for the application for a certificate of appealability in the Ninth Circuit was that jurists of reason would find it debatable whether Watts' Petition states a valid claim of a denial of a constitutional right *and*

jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

SUMMARY OF ARGUMENT

Petitioner, a state prisoner, filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. The district court did not consider the case on the merits, but dismissed it as being time-barred pursuant to the one-year statute of limitations proscribed in Title 28 U.S.C. § 2244(d)(1)(a). Both the district court and the Court of Appeals for the Ninth Circuit denied petitioner's request for a certificate of appealability.

Petitioner contends a certificate of appealability should have been granted because he showed that jurists of reason would find it debatable whether or not the petition states a valid claim of a denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jurists of reason would find it debatable that the petition states a valid claim of a denial of a constitutional right because petitioner was not advised of his constitutional rights when he waived his penalty trial and the trial court failed to conduct a competency hearing when he elected to represent himself.

Jurists of reason would find it debatable that the district court was correct in its procedural ruling dismissing the petition as time-barred because the trial court declined to toll the limitations period during federal

habeas review and declined to equitably toll the limitations period when petitioner has demonstrated extraordinary circumstances beyond his control. Furthermore, jurists of reason would find it debatable the second petition "related-back" to the first petition because the district court judge expressly ordered that Petitioner had the "right to refile" and the state had "notice" of the claims filed in the first petition.

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED IN THIS CASE BECAUSE PETITIONER HAS SATISFIED THE REQUIREMENTS FOR A CERTIFICATE OF APPEALABILITY SET FORTH IN TITLE 28 U.S.C. § 2253(c) AND HE SEEKS RELIEF FOR WRONGFUL DETENTION IN VIOLATION OF THE UNITED STATES CONSTITUTION

1. This Court Has Outlined The Requirements To Earn a Certificate of Appealability When The Federal Habeas Case Was Dismissed On Procedural Grounds

On April 24, 1996, Congress enacted The Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA"). The AEDPA changed dramatically the procedural landscape of federal habeas proceedings. One of the several changes was the requirement that a petitioner must be granted a *certificate of appealability* before a federal Court of Appeal could entertain an appeal of a final

order in a habeas proceeding stemming from a State court. 28 U.S.C. § 2253(c).

Specifically, the "AEDPA" amended § 2253, and added subsection (c), which provides:

> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > "(B) the final order in a proceeding under section 2255.
>
> "(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> "(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. § 2253(c).

In the instant case, Watts' Petition challenges his conviction from a State court. Therefore, Watts must show that his appeal is based on "a denial of constitutional right" as required by 28 U.S.C. § 2253(c)(2). However, in this case, the district court did not decide the case on the merits and dismissed the case because it found that the case was time-barred pursuant to 28 U.S.C. § 2244(d)(1)(a). The district court's ruling was entirely procedural. (Appendix 3, App. 11.)

This Court found that "Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). In order to protect habeas cases which were dismissed on procedural grounds, this Court outlined the requirements to earn a certificate of appealability: "When the district court denies a habeas petition of procedural grounds without reaching the prisoner's underlying constitutional claim, a COA [certificate of appealability] should issue when the prisoner shows, at least, that

a. jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that

b. jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel, supra*, 529 U.S. at 484.

Therefore, determining whether a certificate of appealability should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. (*Id.* at 484-485.)

2. Watts' Petition States A Debatable Claim of Denial of a Constitutional Right

Petitioner's Petition raises six claims: (1) Does the California Supreme Court have a duty to review the

written opinion of a lower appellate court? (2) Must the Requirements of *Boykin/Tahl* be satisfied when defendant waives the penalty trial? (3) Is a Defendant precluded from presenting mitigating evidence at a penalty trial conducted under Penal Code section 190.3 once that state has elected not to pursue the death penalty? (4) The Trial Court's Refusal To Appoint Advisory or co-counsel Was An Abuse of Discretion. (5) The Trial Court Improperly Found That Petitioner Was Competent To Represent Himself. (6) The Trial Court Abused Its Discretion By Denying Petitioner a Further Continuance.

In order to obtain a certificate of appealability to appeal the district court's procedural ruling (dismissing the Petition because it held the Petition was time-barred), Watts must also show that jurists of reason would find it debatable whether the Petition states a valid claim of the denial of a constitutional right. *Slack v. McDaniel, supra,* 529 U.S. at 484.

Watts raised the issue of whether or not he should have been advised of his rights under the rules set forth in *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 274 (1969) and *In re Tahl,* 1 Cal. 3d 122 (1969) when his counsel signed a printed form waiving the penalty trial. Watts was tried on charges of robbery and murder with a special circumstance. Prior to his trial, the prosecutor's office unilaterally decided to forego imposition of the death penalty. Sometime thereafter, the prosecuting attorney asked Watts' appointed counsel to waive the penalty trial. A printed form purporting to waive the penalty trial by mutual agreement was subsequently signed by the prosecuting attorney, defense counsel and Watts. The form did not indicate that Watts had been advised of his

rights under the rules set for the *Boykin v. Alabama*, 395 U.S. 238 (1969) and *In re Tahl*, 1 Cal. 3d 122 (1969); nor was an oral waiver taken in open court which might have been reported.

Before the start of the guilt-phase trial, Watts dismissed appointed counsel and, while acting in pro per, requested that his waiver of the penalty trial be withdrawn on the grounds that he had not understood its meaning. The trial court did not conduct an inquiry into the motion to withdraw from the waiver, nor did it rule on the motion. Watts was ultimately found culpable under the robbery, murder and special circumstance statutes. In accordance with the pretrial waiver, no penalty trial was held and Watts was sentenced to a term of life in prison without the possibility of parole.

In order to comply with the due process mandates embedded in the Fifth and Fourteenth Amendments, when a state criminal defendant pleads guilty, he must so voluntarily and knowingly. *Boykin v. Alabama, supra*, 395 U.S. at 243. A knowing and voluntary guilty plea must include an explicit waiver by the criminal defendant of his constitutional rights against self-incrimination, right to trial by jury, and right confrontation. (*Id.*)

This precept has been extended to other contexts thought to be sufficiently akin to guilty pleas – such as trials by stipulation or where defendants have otherwise waived trial on all issues – courts have sometimes recognized the same "voluntary and knowing" standard may apply. *United States v. Lawson*, 221 U.S. App. D.C. 63, 682 F.2d 1012, 1015 (D.C. Cir. 1982). In the present case, Watts signed a "printed form" waiving his right to a penalty

trial. The form did not indicate that Watts was waiving his right to trial by jury, right against self-incrimination and right to confrontation. Nor, was there an oral waiver on the record. The *Boykin* Court went on to say, "we cannot presume a waiver of these three important federal rights from a silent record." (*Id.* at 243.)

Accordingly, Watts argued to the Ninth Circuit that his petition stated a debatable claim of a denial of a constitutional right.

Watts also raises the claim that the trial court improperly found that petitioner was competent to represent himself. Due process requires that a court conduct a competency hearing on its own motion, before permitting a defendant to waive constitutional rights. *Moran v. Godinez*, 57 F.3d 690, 695 (9th Cir. 1994). This includes competence to waive counsel. *Harding v. Lewis* 834 F.2d 853, 856 (9th Cir. 1987). "To determine whether a defendant actually understands the nature and consequences of his waiver of counsel, the court must abide by the principles set forth in *Faretta v. California*, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). Under *Faretta*, the defendant must be aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation." *Moran v. Godinez, supra*, 57 F.3d at 698.

Watts alleged that the record was clear that he did not understand the fundamentals of trial procedure, lacked awareness of the possible consequences of the waiver of counsel. Watts also alleged that during the trial he did not cross-examine witnesses and lacked the ability to conduct his own representation. In order to protect the

due process rights and the right to competent counsel, reasonable jurists can debate whether or not the trial court improperly found Watts competent to represent himself.

3. Jurists of Reason Would Find It Debatable Whether The District Court Was Correct In Its Procedural Ruling

One of the several changes Congress made to federal habeas proceedings in the "AEDPA" was the creation of a one-year statute of limitations for habeas corpus petitions filed by state prisoners. 28 U.S.C. § 2244. The limitations provision requires habeas petitioners, in most circumstances, to file their federal petitions within one year of the time their state convictions become final on direct review. 28 U.S.C. § 2244(d)(1)(a).

However, for convictions that became final before April 24, 1996, the date of the enactment of the AEDPA, the one-year statute of limitations did not begin to run until April 24, 1996. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997) In the present case, Watts conviction became final on June 13, 1990.[1] Accordingly, because Watts' conviction became final on June 13, 1990, Watts had one year from April 24, 1996, that is, until April 23, 1997, in which to file a federal

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[1] Watts, direct appeal to the California Supreme Court was denied on March 15, 1990. Accordingly, Watts had 90 days from the date of that denial in which to appeal to the United States Supreme Court. Because Watts did not do so, his conviction became final 90 days after March 15, 1990, that is, on June 13, 1990. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999)

habeas claim. (*Id.*) Watts filed his Petition on March 13, 1999.

The statute also provides that the limitations period is tolled where petitioner has a properly filed application for state collateral relief. 28 U.S.C. § 2244(d)(2).

In the present case, Watts filed a habeas application to the California Supreme Court on April 11, 1997, and it was denied on June 17, 1998. The petition was pending for 433 days. Thus, the district court correctly found that the pendency of the petition tolled the period of limitations for 433 days – until June 29, 1998. Watts filed the instant Petition on March 13, 1999, 251 days after June 29, 1998.

The district court ruled that Watts was not eligible for tolling during the time his first federal habeas petition was pending. It also ruled Watts was not entitled to equitable tolling and that the filing of his second habeas petition did not relate back to the filing of his first petition. Accordingly, the district court found that Watts' Petition was time-barred and dismissed the Petition with prejudice. (Appendix 3 and 4.) The Ninth Circuit agreed and denied petitioner's request for a certificate of appealability pursuant to 28 U.S.C. § 2244(d)(1). (Appendix 1.)

a. This Court Has Granted Certiorari To Decide Whether Or Not The One-Year Statute of Limitations Is Tolled During Pendency Of Federal Habeas Corpus Petitions

On November 13, 2000, this Court granted the government's application for a writ of certiorari to decide whether or not the "AEDPA's" mandate to toll its one-

year limitations period during the pendency of "other collateral review" applies to properly filed *federal* habeas petitions as well as habeas applications for state review. *George Duncan v. Sherman Walker*, 121 S. Ct. 480 (2000)

The district court in the present case, relying in part on *Jiminez v. Rice*, 222 F.3d 1210, 1213-1214 (9th Cir. 2000)[2], found that 28 U.S.C. § 2244(d) does not toll the statute of limitations during the time a habeas petition is pending in federal court. (Appendix 3, App. 9.) Accordingly, the district court did not toll the period Watts' first federal petition for writ of habeas corpus was pending in the United States District Court.

Watts filed his first petition in the district court on April 11, 1997, *Watts v. Roe*, CV 97-2470. The district court found that the petition was dismissed without prejudice 151 days later – on September 9, 1997. The district court specifically found that the statute of limitations period was not tolled during these 151 days. (Appendix 3, App. 7-9.)

Watts argues that this issue is debatable among reasonable jurists, especially since the federal circuits are split on this issue, and this Court recently granted certiorari to resolve the conflict.

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[2] On April 24, 2001, the Ninth Circuit withdrew this case and submission is deferred until this Court decides *Duncan v. Walker*, 148 L. Ed. 2d 454.

b. Equitable Tolling

Equitable tolling of the one-year statute of limitations is available if extraordinary circumstances beyond a prisoner's control make it impossible for him to file a petition on time. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288-1289 (9th Cir. 1997). The district court in this case found that Watts is not entitled to equitable tolling. (Appendix 3, App. 10-11.) The Ninth Circuit silently agreed. (Appendix 1.)

In *Calderon, supra*, petitioner's lead counsel who had been diligently working on the case, withdrew from the case after accepting employment in another state, and much of the work product that he left behind was not usable by replacement counsel. The court found that [Beeler] had no control over these "turn of events" which justified equitable tolling to the one-year statute of limitations. (*Id.* at 1289.)

In *Helton v. Singletary*, 85 F. Supp. 2d 1323, 1327-1328 (Southern District of Florida, 2000), defendant's trial counsel incorrectly informed him as when the one-year statute of limitations period to file his federal habeas corpus petition began to run. The court found that this misinformation was an "extraordinary circumstance" warranting equitable tolling.

In the present case, petitioner presented evidence that he is a slow learner, is illiterate and was prevented from understanding the law. The cases which found "extraordinary circumstances" to warrant equitable tolling, involved situations where the "events or circumstances" were out of the petitioner's control. The focus is

on "external forces, rather than a petitioner's lack of diligence" when deciding whether or not the case should be equitably tolled. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).

In this case, reasonable jurists can debate whether or not Watts' lack of education and illiteracy is an "event or circumstance" out of his control or an external force, thus warranting equitable tolling. If another court found that misinformation from an attorney warrants equitable tolling, then it is not unreasonable that another court can debate whether or not Watts' alleged illiteracy and lack of education also warrants equitable tolling.

c. Petitioner's Second Petition "Relates Back" To His First Federal Petition

Relying on *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999), the district court found that the instant Petition did not "relate back" to the filing date of Watts' first petition (filed April 11, 1997) that was dismissed for failure to exhaust state remedies. (Appendix 3, App. 11.) The facts in *Henry v. Lungren* are distinguishable to this case. In *Henry v. Lungren, supra*, 164 F.3d at 1241, the district court dismissed the first petition in 1995 without prejudice. Then the petitioner refiled in the state court in an effort to satisfy the exhaustion requirement. The petition in the state court was denied. Petitioner filed the second petition in federal court on March 17, 1997, after his release from prison and discharge from parole. (*Id.* at 1241) The question in *Henry v. Lungren* was whether the petition filed on March 17, 1997, after petitioner was

released from custody, related back to the first petition, so that he satisfied the "in custody" requirement. (*Id.*)

The court noted "the Federal Rules of Civil Procedure apply to habeas corpus proceedings, "to the extent that the practice in such proceedings is not set forth in statutes of the United States." Rule 15(c)(2) provides for the relation back of an amended pleading to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). *Henry v. Lungren, supra* 164 F.3d at 1241.

The court found that petitioner's second petition did not relate back to the first petition because the district court did not *expressly or impliedly* retain jurisdiction over the first petition when it dismissed it for failure to exhaust. (*Id.* at 1241.) In the present case, the district court expressly ordered that Watts' first habeas petition be dismissed without prejudice with a *right to refile after exhaustion of state remedies*. (Appendix 3, App. 7.) In *Henry v. Lungren, supra,* the district court did not specifically include in the dismissal order that the petitioner had a "right to refile." Accordingly, in this case, Watts' second petition filed March 13, 1999, relates back to the first petition filed on April 11, 1997.

In *Williams v. Vaughn*, 3 F. Supp. 2d 567, 571-572, (U.S. District Court for the Eastern District of Pennsylvania 1998), the court found that the second petition "related back" to the first petition "because both petitions allege constitutional defects surrounding the same "occurrence" – petitioner's trial and penalty phases – under Rule

15(c)(2), the Amended Petition relates back to the original filing date. Similarly, in the present case, Watts' second petition relates back to the first petition because both petitions allege the following claims:

(1) Petitioner did not voluntarily waive penalty trial.

(2) The failure of the trial court to appoint advisory or co-counsel.

(3) The trial court erred in allowing petitioner to represent himself in a capital case violating the state and federal Constitutions.

(4) The trial court violated petitioner's constitutional rights when it denied petitioner's motion for a continuance.

In *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), the court found that a second petition "related back" to the first petition because the central policy of Rule 15(c) – ensuring that the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment – has been satisfied." The touchstone of Rule 15(c) is "notice." Those claims presented in the second pleading, which had been set forth or attempted to be set forth in the original pleading, relate back to the original pleading. The state "clearly had prior notice of the claims and of [petitioner's] intention to raise them at the earliest possible time." (*Id.*)

Accordingly, since the district court judge expressly ordered that Watts had the "right to refile" and the state had "notice" of the claims in the first petition filed on April 11, 1997, reasonable jurists can debate whether or

not the second petition filed on March 13, 1999, related back to the first petition.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the petition for writ of certiorari should be granted.

Dated: June 19, 2001

Respectfully Submitted,

LAW OFFICES OF BARRY BERNSTEIN
KARYN H. BUCUR
Attorney for Petitioner

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON WATTS, Petitioner-Appellant, v. ERNEST C. ROE, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 01-55083 DC# CV-99-02932-WMB Central California (Los Angeles) ORDER (Filed Mar. 30, 2001)

Before: WALLACE and SILVERMAN, Circuit Judges

Appellant's request for a certificate of appealability is denied. *See* 28 U.S.C. § 2244(d)(1). All of appellant's outstanding motions are denied.

APPENDIX 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LEON WATTS, Petitioner, v. E. ROE, Warden, Respondents.	No. CV 99-2932-WMB (JWJ) ORDER DENYING PETITION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY (Filed Jan. 4, 2000)

On November 30, 2000, petitioner filed a Petition for Issuance of a Certificate of Appealability. 28 U.S.C. 2253; Fed. R. App. P. 22(b).

For the reasons stated in the report and recommendation of the magistrate judge (filed on September 11, 2000) and the order accepting the report and recommendation (filed on November 8, 2000), the Court finds that petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b).

IT IS THEREFORE ORDERED that the Petition for Issuance of a Certificate of Appealability is DENIED.

DATED: Jan. 4, 2001

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DISTRICT

LEON WATTS, Petitioner, vs. E. ROE, Warden, Respondent.	Case No. CV 99-0294332 CM (JWJ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Sept. 11, 2000)

This Report and Recommendation is submitted to the Honorable Carlos R. Moreno, United States District Judge, by United States Magistrate Judge Jeffrey W. Johnson, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that respondent's Motion to Dismiss be granted, that petitioner's Petition for Writ of Habeas Corpus be denied, and that this action be dismissed with prejudice.

I. BACKGROUND

On March 22, 1999, petitioner Leon Watts, a state prisoner proceeding *pro se*, filed a "Petition for Writ of Habeas Corpus by a Person in State custody (28 U.S.C. § 2254)" ("Petition") in the United States District Court

for the Central District of California.[1] The Petition challenges the conviction petitioner received on December 16, 1985 in the Los Angeles Superior Court for murder and robbery. (Petition, p. 3.) The Petition sets forth several grounds on which petitioner claims he is being held unlawfully. (Petition, p. 6.)

On July 1, 1999, respondent Ernest Roe filed a Motion to Dismiss the Petition on the ground that it was untimely pursuant to the statute of limitations set forth at 28 U.S.C. § 224(d). On August 16, 1999, petitioner filed a "Motion to Respond to the Respondent Motion [etc.]," which the Court construes as an Opposition to the respondent's Motion to Dismiss. On August 23, 1999, respondent filed a Reply to the Opposition to the Motion to Dismiss.

Accordingly, this matter is deemed under submission and ready for decision.

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[1] The Ninth Circuit has recently extended the "mailbox rule" first set forth in *Houston v. Lack*, 487 U.S. 266, 276, 108 S.Ct. 2379, 101 L. Ed.2d 245 (1988) to habeas corpus petitions filed under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Saffold v. Newland*, ___ F.3d ___, 2000 WL 973282, *4 (9th Cir. 2000). The "mailbox rule" provides that a federal habeas application is deemed filed at the moment the petitioner delivers it to prison authorities for forwarding to the clerk of court. *Id.* The instant Petition bears a Proof of Service dated March 13, 1999. Accordingly, under *Saffold*, the Court will construe the instant Petition to have been filed as of March 13, 1999.

II. DISCUSSION

The instant Petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") because the Petition was filed with this court after April 24, 1996, the effective date of the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 326-27, 117 S. Ct. 2059, 2063, 138 L. Ed. 2d 481 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1494 (9th Cir.) (en banc), *cert. denied*, 479 U.S. 922, 118 S.Ct. 586, 139 L. Ed. 2d 423 (1997).

A. The One-Year Statute of Limitation in 28 U.S.C. § 2244(d).

Respondent asserts that petitioner is barred by the one-year of statute of limitation set forth at 28 U.S.C. § 2244(d). (*See* MTD, pp. 1-2.)

Section 2244(d)(1) provides as follows:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claims or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

In addition, "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

B. Summary of Proceedings and Standard of Review.

1. Summary of Direct and Collateral Review.

Petitioner states that he brought a direct appeal of his conviction to the California Court of Appeals, and that appeal was denied on November 21, 1989. (Petition, p. 3.) Petitioner then appealed to the California Supreme Court, and that appeal was denied on March 15, 1990. (Petition, p. 4.) Petitioner sought no further direct review of his conviction.

Petitioner then brought a petition for writ of habeas corpus to the Los Angeles Superior Court, and that petition was denied on December 22, 1994. (Petition, p. 5.)

On April 11, 1997, petitioner filed his first federal habeas application with the United States District Court, Central District of California, case no. CV 97-2470 WMB (Mc). (Petition, p. 5.) That petition was pending for approximately five months, and then that petition was denied without prejudice to petitioner's right to re-file after exhaustion of state remedies on September 9, 1997.[2] (Petition, p. 5.)

Petitioner then brought a habeas application in the California Supreme Court, and that petition was denied on June 17, 1998.[3] (Respondent's Motion to Dismiss ("MTD"), p. 3, Exh. H.)

As noted *supra* at p. 2, fn. 1, the Court construes the instant Petition to have been filed on March 13, 1999. *See Saffold v. Newland*, ___ F.3d ___, 2000 WL 973282, *4 (9th Cir. 2000).

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[2] Respondent asserts that this federal habeas application was denied on September 12, 1997. (*See* MTD, p. 3.) However, a search of the Court's docket reveals that the petition was denied on September 9, 1997, as petitioner asserts.

[3] Petitioner states that his habeas application to the California Supreme Court was denied on June 17, 1997. (*See* Petition, p. 5.) However, respondent has attached as "Exhibit H" to the Motion to Dismiss a copy of the file-stamped denial by the California Supreme Court of Petitioner's habeas application, and that denial is dated June 17, 1998. Accordingly, the Court construes petitioner's habeas application to the California Supreme Court as denied on June 17, 1998.

2. Standard of Review for Convictions That Became Final Before AEDPA.

Petitioner's direct appeal to the California Supreme Court was denied on March 15, 1990. (Petition, p. 4.) Accordingly, petitioner had 90 days from the date of that denial in which to appeal to the United States Supreme Court. Because petitioner did not do so, his conviction became final 90 days after March 15, 1990, that is, on June 13, 1990. *See* 28 U.S.C. § 2101(d); Supreme Court Rule 13.1; *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

However, for convictions that became final before April 24, 1996, the date of the enactment of the AEDPA, the one-year statute of limitations did not begin to run until April 24, 1996. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1286 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 899 (1998), *overruled on other grounds in Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1377 (1999). Accordingly, because petitioner's conviction became final on June 13, 1990, petitioner had one year from April 24, 1996, that is, until April 23, 1997, in which to file the instant Petition. (*Id.*) Because the Court construes the instant Petition to have been filed on March 13, 1999, it appears that, absent tolling, petitioner has missed the April 23, 1997 deadline by almost two years.

C. Statutory and Equitable Tolling

1. Statutory Tolling.

The limitations period is tolled where petitioner has "properly filed [an] application for state collateral relief."

28 U.S.C. § 2244(d). In addition, for purposes of § 2244(d), the time, including the interval between the disposition of an appeal or post-conviction petition and the filing of an appeal or successive petition at the next state appellate level, must be tolled for the entire period in which a petitioner is appropriately pursuing and exhausting his state remedies. *Nino v. Galaza*, 183 F.3d 1003, 1004 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1846, 2000 WL 507534 (May 1, 2000). Section 2244 of Title 28 of the United States Code also provides, *inter alia*, that "[t]he limitation period shall run from the latest of – . . . the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(A).

However, AEDPA's statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case "pending" during that interval. *Nino v. Galaza*, 183 F.3d at 1006. Furthermore, § 2244(d) does not toll the statute of limitations during the time a habeas petition is pending in federal court. *Jiminez v. Rice*, ___ F.3d ___, 2000 WL 1180557 *5 (9th Cir. August 22, 2000); *Sperling v. White*, 30 F. Supp. 2d 1246, 1250 (C.D. Cal. 1998).

Petitioner's habeas application to the California Supreme Court was filed on April 11, 1997, and denied on June 17, 1998. (MTD, p. 6.) Counting both the day this petition was filed and the day it was denied, the petition was pending for 433 days. (MTD, p. 7.) Thus, assuming the petition was "properly filed" within the meaning of

§ 2244(d)(2), the pendency of the petition tolled the period of limitations for 433 days. Consequently, the April 23, 1997 filing deadline was extended 433 days, until June 29, 1998. However, the instant Petition was not filed until March 13, 1999, more than eight months – 251 days, to be exact – after the tolled deadline had expired.

Petitioner has presented no argument that state action created an impediment to filing the instant Petition. Thus, because petitioner is not eligible for tolling during the time his first federal habeas petition was pending, and because petitioner apparently pursued no further state court remedies, statutory tolling is not adequate to rescue the instant Petition.

2. Equitable Tolling.

The Ninth Circuit permits equitable tolling of the AEDPA statute of limitations "if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1287 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099 (1998) and 523 U.S. 1061 (1998), *overruled on other grounds* in *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998).

Petitioner presents one argument that could be construed as a request for equitable tolling, namely, that when petitioner's first federal habeas application was dismissed for lack of exhaustion, petitioner understood that he could return to federal court with a second petition after exhausting his available state remedies. (*See*

petitioner's "Motion to Respond to the Respondent Motion [etc.]".)

This argument must fail for at least four reasons. First, dismissal for lack of exhaustion did not relieve petitioner of the duty of complying with the statute of limitations set forth at 28 U.S.C. § 2244(d). *See Jiminez v. Rice*, ___ F.3d ___ 2000 WL 1180557, *1 (9th Cir. August 22, 2000) (where petition dismissed for lack of exhaustion, later petition which would be untimely is barred). Second, petitioner's ignorance of the law is not an "extraordinary circumstance" sufficient to justify equitable tolling. *See Sperling v. White*, 30 F. Supp. 2d 1246, 1254 (C.D. Cal. 1998) (and cases cited therein). Third, the filing of a second habeas petition does not relate back to the filing date of a previous petition that was dismissed without prejudice for failure to exhaust state remedies. *See Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999). Finally, even if petitioner was given credit for the 151 days during which time his first federal habeas application was pending, petitioner still falls 100 days, or more than three months, short of the date on which the instant Petition was due.[4]

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[4] As discussed *supra* at p. 6, after crediting the time that petitioner's state court habeas application was pending, petitioner was 251 days past the date the instant Petition was due to be filed. Petitioner's first federal habeas application was pending for 151 days. Thus, even crediting petitioner 151 days for the time his first federal petition was pending, 251 days minus 151 days still leaves petitioner 100 days past the filing deadline for the instant Petition.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the court issue an order: (1) approving this Report and Recommendation; (2) granting respondent's Motion to Dismiss; and (3) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: September 8, 2000

/s/ Jeffrey W. Johnson
JEFFREY W. JOHNSON
United States
Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

APPENDIX 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DISTRICT

LEON WATTS, Petitioner, vs. E. ROE, Warden, Respondent.	Case No. CV 99-2932-WMB (JWJ) JUDGMENT (Filed Nov. 8, 2000) THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge.

IT IS ADJUDGED that respondent's Motion to Dismiss is granted, that petitioner's Petition for Writ of Habeas Corpus is denied, and that this action is dismissed with prejudice.

DATED: Nov. 4, 2000

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

IT IS FURTHER ORDERED that the Clerk shall serve forthwith a copy of this Order, the Magistrate's judge's Report and Recommendation, and the Judgement

herein by the United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Nov. 4, 2000

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge